SP ANNAMALAI SUBRAMANIAM CHETTIAR

v.

PERBADANAN PEMBANGUNAN BANDAR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-132-1996]
18 FEBRUARY 2000

CONTRACT: *Sale and purchase of land - Breach - Whether there was a concluded contract between vendor and purchaser - Vendor not the registered proprietor - Back-to-back agreements - Vendor and purchaser to execute sale and purchase agreement first - Vendor to then purchase land from registered proprietors - Whether purchaser aware of back-to-back agreements all along - Whether purchaser's refusal to execute sale and purchase agreement amounted to a breach of contract - Remedies*

The appellant had an option in respect of a piece of property. He was never the registered proprietor and this was known to the respondent at all times. It was agreed between the parties that back-to-back agreements would be executed whereby the respondent would first purchase the property from the appellant's nominee ('Sulaiman') and Sulaiman would then purchase the property from its registered proprietors. As it transpired, the respondent refused to execute the sale and purchase agreement with Sulaiman, claiming that, all along, it had only wanted to deal directly and execute a sale and purchase agreement with the registered proprietors of the property. The learned judge dismissed the appellant's claim for loss of profits arising from breach of contract on the grounds that: (i) Sulaiman was never the registered proprietor of the property as was declared in the sale and purchase agreement that was to be executed between the respondent and Sulaiman; and (ii) the appellant's option to purchase the property from its registered proprietors had lapsed when he sought to execute the back-to-back agreements.

Held:
Per Shaik Daud Ismail JCA

[1] The contemporaneous documents left no doubt that the respondent was well aware, from the very beginning, that the appellant was not the registered proprietor of the property, and that the back-to-back transactions were part and parcel of their initial agreement. It was clear to the parties that the sale and purchase agreement between Sulaiman and the respondent was to be executed first, and that the payments that were to be made to Sulaiman by the respondent were to be utilised by Sulaiman to purchase the property from its registered proprietors. The learned judge had erred in failing to consider and appreciate this. A contract had already existed between the appellant and the respondent when the respondent confirmed the final draft of the sale and purchase agreement. The respondent breached this contract when it aborted the sale and purchase agreement.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah mempunyai opsyen berkenaan dengan sebuah harta tanah. Dia tidak pernah menjadi tuan punya yang berdaftar dan ini diketahui oleh responden sepanjang masa. Telah dipersetujui oleh kedua-belah pihak bahawa perjanjian-perjanjian imbangbalas akan dilaksanakan di mana responden akan pada mulanya membeli harta tanah daripada namaan perayu ('Sulaiman') dan Sulaiman akan kemudiannya membeli harta tanah tersebut dari pemilik-pemilik berdaftar. Kemudiannya, responden enggan melaksanakan perjanjian jualbeli dengan Sulaiman, sambil mengadu bahawa, sepanjang masa, ia hanya hendak berurusan secara langsung dengan pemilik-pemilik berdaftar harta tanah berkenaan. Hakim bijaksana telah membuang tuntutan perayu untuk kehilangan keuntungan berpunca dari mungkir kontrak atas alasan-alasan bahawa; (i) Sulaiman tidak pernah menjadi pemilik berdaftar harta tanah seperti yang diisytiharkan dalam perjanjian jualbeli yang akan dilaksanakan di antara responden dan Sulaiman; dan (ii) opsyen perayu untuk membeli harta tanah berkenaan dari pemilik berdaftarnya telah terluput bilamana dia cuba untuk melaksanakan perjanjian-perjanjian imbangbalas tersebut.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Dokumen-dokumen semasa tidak meninggalkan sebarang keraguan yang responden sememangnya menyedari, dari mulanya, bahawa perayu bukanlah pemilik berdaftar harta tanah, dan transaksi-transaksi imbangbalas tersebut adalah sebahagian dari perjanjian awal mereka. Adalah ketara pada kedua-belah pihak bahawa perjanjian jualbeli antara Sulaiman dan responden perlu dilaksanakan terlebih dahulu, dan bayaran yang dibuat oleh responden kepada Sulaiman akan digunakan untuk membeli harta tanah dari pemilik-pemilik berdaftar tersebut. Hakim bijaksana salah apabila gagal untuk mempertimbangkan dan menyedari hal ini. Suatu kontrak telah terwujud di antara perayu dan responden bilamana responden telah mengesahkan deraf terakhir perjanjian jualbeli tersebut. Responden telah mengingkari kontrak ini bila ia membantutkan perjanjian jualbeli tersebut.

[Rayuan dibenarkan.]

Case(s) referred to:
Brickles v. Shell [1916] 2 AC 599 ***(refd)***
Halimah Abdul Rahman v. Fatimah Abdullah [1976] 2 MLJ 64 ***(refd)***
Sinniah Pampayan v. Muthuvelu Pillai Palanichamy Pillai [1996] 4 CLJ 538 ***(refd)***

For the appellant - Maidzuara Mohamed (Mohd Izral Khairy with her); M/s Logan Sabapathy & Co
For the respondent - Ramid Khan; M/s Zainur Zakaria & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-22-275-91]

Reported by Alex KC Lee

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the High Court Kuala Lumpur which had dismissed the appellant's claim against the respondent. The appellant's claim essentially is for loss of profits arising out of the respondent's alleged breach of contract.

The background facts are that the appellant is an option holder for a property known as Lot 2084 Section 41, Kuala Lumpur, (the said property) with power to sell the said property to the respondent. It is not disputed that at all times, the appellant was not the registered proprietor of the said property and this is known from the beginning by the respondent. In fact the said property was jointly owned by seven persons living in different

parts of the world and this too is known to the respondent. Through negotiations and meetings held from 14 December 1989 the respondent had offered to purchase the said property from the appellant at RM64 per sq. foot. The appellant had accepted the offer. According to the appellant, at a meeting on 17 April 1990 at the office of Messr. Zain & Co a firm of solicitors in Kuala Lumpur, the appellant had informed a representative of the respondent that:

(a) the appellant through a nominee, one Sulaiman Daud, will purchase the said property from the registered proprietors; and

(b) the nominee, Sulaiman Daud, will execute a sale and purchase agreement with the respondent to sell the said property to the respondent for a sum of RM1,218,560.

To achieve the above objectives, the parties would prepare and execute back to back agreements in that the nominee, Sulaiman Daud, would sign the sale and purchase agreement with the respondent in order to get the deposit from the respondent and using this money, the nominee, Sulaiman Daud, will execute a sale and purchase agreement with the registered proprietors. It is the contention of the appellant that the respondent was at all material times aware of this back to back transaction.

Subsequent to the meeting of 17 April 1990, another meeting was held at the office of the respondent where the officers of the respondent, the appellant and the nominee, Sulaiman Daud, were present and thereafter the respondent had instructed a sale and purchase agreement to be prepared by the solicitors Messrs. Zain & Co. As a result Messrs. Zain & Co. prepared a draft agreement to be sent to the respondent. The respondent in return indicated their satisfaction with the said draft agreement and thereafter on 25 April 1990 the same solicitors prepared four final copies of the agreement and transmitted them to the respondent for its execution. The respondent refused and failed to sign the agreement and thereby refused to proceed with the sale and purchase of the said property resulting in the appellant and his nominee not being able to purchase the said property from the registered proprietors.

The respondent on the other hand denied the averments of the appellant and contends that it was its sole intention from the very beginning to deal solely with the registered owners and would only execute a sale and purchase agreement with them. The respondent contended that the sale fell through as the appellant had failed to arrange for the execution of the sale and purchase agreement with the registered proprietors or their attorneys. The respondent denied that it had agreed to bind itself with either the appellant or his nominee.

The learned judge had dismissed the appellant's claim with costs broadly on the ground that although the respondent had agreed to purchase the said property but the agreement between it and the nominee, Sulaiman Daud, shows that Sulaiman Daud was the registered owner of the said property when at all material times, Sulaiman Daud, had not executed the agreement with the original registered owners. The learned judge also held that the option granted to the appellant had lapsed when he sought to transact the back to back agreements and that the sale of the said property to Sulaiman Daud was subject to obtaining an order of the court by one of the co-owners.

We are of the view that the learned judge erred in that he failed to examine the contemporaneous documents which would conclude that the respondent was aware from the very beginning that the appellant was not the registered owner of the said property and he had entered into the transaction solely for profit.

The learned judge appeared to have failed to consider and appreciate seriously the evidence of the sole witness for the respondent one Kamarzaman b. Kamaludin, especially on his admissions. His evidence if properly analysed entailed the premise that he knew all along that the appellant was not the owner of the said property and hence the need to have the back to back transaction. He knew the true identity of the owners whose solicitors were Messrs. Shearn Delamore & Co. The learned judge appeared to have neglected to consider or consider sufficiently the handwritten note dated 25 April 1990 by Kamarzaman to the appellant (see p. 153 of Appeal Record) where he acknowledged receipt of the sale and purchase agreement from Messrs. Zain & Co. and that "they would sign first and return same to Zain & Co. on 3 May 1990". When this note was sent to the appellant, Kamarzaman knew the actual situation as to the ownership of the said property. In spite of this, the respondent was prepared to sign the agreement. In the light of this evidence, Kamarzaman's evidence of his understanding that Sulaiman Daud would purchase the said property from the owners first and then only would sell it to the respondent should not be accepted as the truth. The evidence of the solicitors acting for the appellant also confirmed the need to execute the back to back transactions was as per instructions that the appellant was to utilise the payments from the respondent to purchase the said property. Hence the need, as confirmed by Kamarzaman in his handwritten note to the appellant, for the respondent to sign the sale and purchase agreement with Sulaiman Daud first before Sulaiman Daud needed to sign the agreement with the owners. The fact that Kamarzaman knew that the agreement

between Sulaiman Daud and respondent was to be signed first was further enhanced by the evidence that there was a request by the appellant for the respondent to pay the 10% deposit direct to the landowners or to the appellant's solicitors, Zain & Co.

Therefore it is evident from the series of contemporaneous correspondences between the appellant and the respondent that it was agreed between the parties that the sale and purchase agreement between the appellant and the respondent would be signed first, to enable the appellant to obtain the necessary funds to sign the agreement with the land owners. There is clear evidence from the appellant's solicitor explaining the mechanics of how this back to back transaction was to work and all along was within the knowledge of the respondent. Therefore when the learned judge held the reverse it went against the evidence adduced.

The issue finally was whether a contract existed between the appellant and the respondent and if so, when. From the totality of the evidence we were satisfied that a contract existed between the appellant and the respondent and this was on 25 April 1990 when the respondent confirmed the final draft of the agreement. From that date onwards a contractual relationship existed between the appellant and the respondent. We were also satisfied that from a series of contemporaneous correspondences between the solicitors for the appellants and the solicitors for the landowners, a contractual relationship existed between the landowners and the appellant. The respondent aborted the agreement with the appellant by its letter dated 25 May 1990 wherein for the very first time it raised the issue of the appellant or his nominee, Sulaiman Daud, not being the registered owner of the said property when at all material times it was aware of the actual circumstances. This sort of transaction was not uncommon. A vendor having neither a title nor the power to obtain a title was not prevented to enter into a contract to sell land or for that matter any chattel, provided he promised to transfer the title on acquiring it. If he failed to do so, the vendor would be equally entitled to be sued for specific performance. The fact that at the date of the contract the vendor had neither the title nor the power to call for the title is itself no answer to a suit for specific performance by either party. (See *Brickles v. Shell* [1916] 2 AC 599; *Halimah binti Abdul Rahman v. Fatimah binti Abdullah* [1976] 2 MLJ 64; and *Sinniah a/l Pampayan v. Muthuvelu Pillai a/l Palanichamy Pillai* [1996] 4 CLJ 538; [1997] 1 MLJ 403).

In the present case, if the reverse took place ie, if the appellant failed to transfer the said property to the respondent after it had been transferred to him or his nominee, the respondent could successfully sue him for specific performance. It came to light that subsequently the State Authority acquired the said property for the respondent and this might well explain the reason for the respondent aborting the back to back transaction.

Therefore, in view of the admissions by the respondent of its knowledge at all material times that the transactions were to be carried out on a back to back basis and in the light of the contemporaneous documents and the totality of the evidence, we were satisfied that the respondent had breached the agreement with the appellant resulting in his loss of profits which in our view is the natural consequence of the breach. We, therefore, allowed the appeal with costs here and below, set aside the order of the High Court and entered judgment in favour of the appellant in terms of prayers (a) (b) and (e) of his statement of claim. We also ordered the deposit be refunded to him.